IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

U.S. PATENT APPLICATION NUMBER	10/683,564
FILING DATE	10 October 2003
INVENTOR	Keith Woodard et al.
ASSIGNEE	Symantec Corporation
GROUP ART UNIT	2141
EXAMINER	Djenane M. Bayard
TITLE	METHOD AND SYSTEM FOR SCANNING NETWORK DEVICES
ATTORNEY'S DOCKET NO.	55994.0136

REPLY BRIEF

To: MS Appeal Brief – Patents
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Dear Sir:

In accordance with 37 C.F.R. § 41.41(a), Appellants respectfully submit this Reply Brief to the Examiner's Answer dated 4 September 2008. This Reply Brief contains items under the following headings, as required by 37 C.F.R. § 41.37(c) and MPEP 1208:

I. Status of Claims

II. Grounds of Rejection to be Reviewed on Appeal

III. Arguments

I. STATUS OF CLAIMS

A. Total Number of Claims in Application

There are 43 claims currently pending in the present application: claims 1-10, 12-25, 27-34, and 36-46.

B. Current Status of Claims

1. Objected-to claims: None
2. Cancelled claims: claims 11, 26, and 35
3. Claims withdrawn from consideration but not canceled: None
4. Allowed claims: None
5. Rejected claims: 1-10, 12-25, 27-34, and 36-46.

C. Claims On Appeal

Appellants are appealing the rejection of claims 1-10, 12-25, 27-34, and 36-46.

II. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

Claims 1-4, 6-10, 12, 14-18, 20-24, 31, 36, and 44 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent Application No. 2003/0212779 to Boyter et al. ("Boyter") in view of U.S. Patent Application No. 2005/0050335 to Liang et al. ("Liang"). Claims 38 and 41 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Boyter in View of Liang, and further in view of U.S. Patent Application No. 2005/0015760 to Ivanov et al. ("Ivanov"). Claims 27-30 and 33-34 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Boyter in view of Liang, and further in view of U.S. Patent No. 6,993,448 to Tracy et al ("Tracy").

Claim 5 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Boyter in view of Liang, and further in view of U.S. Patent Application No. 2001/0047401 to Moore et al. ("Moore"). Claims 13, 19, and 25 stand rejected under 35 U.S.C. § 103(a) to Boyter in view of Liang, and further in view of U.S. Patent Application No. 2004/0268145 to Watkins et al. ("Watkins"). Claims 32 and 37 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Boyter in view of Liang, and further in view of U.S. Patent No. 6,546,493 to Medic et al. ("Medic"). Claims 39, 42, and 45 stand rejected under 35 U.S.C. § 103 (a) as being unpatentable over Boyter in view of Liang. Claims 40, 43, and 46 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Boyter in view of Liang, and further in view of U.S. Patent Application No. 2006/0010492 to Heintz et al. ("Heintz").

Appellants respectfully request that these grounds of rejection be reviewed in the instant Appeal.

III. ARGUMENT

The following remarks respond to the Examiner's Answer, dated 4 September 2008.

A. Liang does not Teach the Claimed Relationship between Remote Agentless Scanning and Detection of a Network Device

As noted in the Appeal Brief filed on 23 July 2008, "Liang does not teach the claimed relationship between remote agentless scanning and detection of a network device." *Pages 10 and 11.* For example, claim 1 recites "the remote agentless scanning being performed automatically *in response to* detection of the first network device." *Emphasis Added.* Liang's determination, even if it could be compared to remote agentless scanning, is not performed in response to the detection of a network device. The claimed causal relationship between network device detection and remote agentless scanning is not taught by Liang, is not remedied Boyter, and is not even addressed by the Examiner in the Examiner's Answer.

B. Appellants are not Reading Limitations from the Specification into the Claims

In noting that the claims address problems that are not recognized by the cited references, Appellants are showing the weakness of the Examiner's obviousness rejection and are not reading limitations into the claims. The Examiner argues:

> It is noted that the features upon which applicant relies (*i.e.*, computers that ordinarily connect to the network using transient means, such as virtual private network connection or using a wireless access point) are not recited in the claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims.

Examiner's Answer, page 19. Appellants are not relying on the feature of "computers that ordinarily connect to the network using transient means" to distinguish over the cited references.

The feature of the claims that Appellants are discussing in the section of the Appeal Brief cited by the Examiner is "remote agentless scanning being performed automatically *in response to* detection of the first network device," which, as previously discussed, is not disclosed in the cited references. Appellants mention "computers that ordinarily connect to the network using transient means" to illustrate a problem that is solved by "remote agentless scanning being performed automatically in response to detection of the first network device." Liang does not recognize this problem and therefore could not be expected to, and in fact does not, provide the claimed solution.

C. *The Examiner has not Articulated Reasoning with Some Rational Underpinning to Support the Legal Conclusion of Obviousness*

In the Appeal Brief, Appellants note that "the Examiner's reasoning does not show why a skilled artisan would have found the claimed invention obvious in light of the teachings of Boyter and Liang" because "the Examiner's reasoning for combining Boyter and Liang is a quote from the background of Liang about the problems addressed by Liang, but is not related to the problems addressed (or the solutions provided) by claim 1." *Page 14.* In the Examiner's Answer, the Examiner does not address this issue. Instead, the Examiner reiterates the quote from Liang and makes the conclusory statement that "the Examiner has clearly established a *prima facie* case of obviousness."

As Appellants noted in the Appeal Brief, "even if the Examiner's reasoning is correct and a combination of Boyter and Liang provides a system with "multilevel anti-virus function for anticipating and detecting computer virus outbreak," such a combination does not provide "remote agentless scanning performed in response to detection of a network device." Indeed, "a network level virus monitoring system capable of monitoring a flow of network traffic in any of a number of

inspection modes" is the stated objective of Liang, but not of the present invention. *Liang, Abstract.* Instead, the claims are directed to remote agentless scanning of network devices in response to their connection to a network. The Examiner has not shown how Liang's teaching of "multilevel anti-virus function for anticipating and detecting computer virus outbreak" would motivate one of ordinary skill in the art to combine Boyter and Liang to provide "remote agentless scanning performed in response to detection of a network device."

D. Liang does not Perform Remote Agentless Scanning

In the Appeal Brief, Appellants note that Liang does not perform remote agentless scanning. *See* pages 11 and 12. With respect to Appellant's points about remote agentless scanning, the Examiner states:

> The citation that Appellant is referring to is indeed taking place in the process of Liang but only after a device has connected to the network and a determination of the security settings of the device are made. Liang will proceed to the remote installation of the software after determining that no software is present. The Examiner respectfully disagrees with Appellant taking a citation out of context from the prior art of Liang to present the cited above argument.

Examiner's Answer, page 20. Appellants did not take the citation from Liang out of context. Appellants make the point that Liang, instead of teaching remote agentless scanning, appears to teach that the client devices themselves "check[] for confirmation that the appropriate anti-virus software is present." *Liang, paragraph 0055.* In accusing Appellants of taking the citation from Liang out of context, the Examiner continues to fail to show anywhere that Liang shows, teaches, or suggests remote agentless scanning.

Remote agentless scanning is scanning performed without the use of software loaded on the network device. *See Appeal Brief, page 12; Application, page 9, lines 8-9.* In attempting to show how Liang teaches remote agentless scanning, the Examiner states that "Liang clearly teaches . . . .

'each of the client devices checks for confirmation that the appropriate anti-virus software is indeed present." In Liang, the client devices themselves check, presumably using software, for confirmation that the appropriate anti-virus software is present. In other words, the client devices appear to be scanning themselves for anti-virus software, and this type of scanning is not remote agentless scanning because remote agentless scanning is performed without the use of software loaded on the client device. The Examiner has not show anywhere in Liang that teaches that a remote device scans a client device.

Liang's teaching that the client devices scan themselves cannot support the Examiner's use of Liang to teach "remote agentless scanning" without additional evidence. As noted in MPEP section 706.02, "For anticipation under 35 U.S.C. 102, the reference must teach every aspect of the claimed invention either explicitly or impliedly. Any feature not directly taught must be inherently present." While the Examiner's rejection is a 35 U.S.C. 103 rejection, the same principle applies with respect to the features that the Examiner is attempting to use Liang to show. Since remote agentless scanning is not directly taught in Liang, the Examiner's rejections cannot be maintained unless remote agentless scanning is inherent in Liang.

In order to rely on inherency, the "Examiner must provide rationale or evidence tending to show inherency." *MPEP 2112*. Furthermore, "To establish inherency, the extrinsic evidence 'must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.'" *In re Robertson*, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999). The Examiner has not shown that remote agentless scanning is

necessarily present in Liang. The Examiner has not provided any rationale or evidence that would tend show remote agentless scanning is inherent in Liang. Accordingly, the Examiner has not shown that Liang teaches every aspect of the claimed invention either explicitly or impliedly. Therefore, the Examiner's use of Liang in the 35 U.S.C. 103 rejections is improper.

IV. CONCLUSION

For at least the foregoing reasons and the reasons described in the Appeal Brief, Appellants believe that each of the finally rejected claims in this application is in immediate condition for allowance. Accordingly, Appellants respectfully request the reversal of the rejections of these claims and allowance of the same.

Respectfully submitted,

Date: 4 November 2008

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Enclosures: Transmittal of Reply Brief